Board Distribution Draft – August 29, 2006

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FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 330

RIN 3064 – AD01

Deposit Insurance Regulations; Inflation Index; Certain Retirement Accounts and Employee Benefit Plan Accounts

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Final rule.

SUMMARY: The FDIC is finalizing its interim rule with changes that amended regulations to implement deposit insurance revisions made by the Federal Deposit Insurance Reform Act of 2005 and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005.

DATE: The final rule is effective on [INSERT DATE 30 DAYS AFTER PUBLICATION DATE].

FOR FURTHER INFORMATION CONTACT: Joseph A. DiNuzzo, Counsel, (202) 898-7349, Legal Division, Federal Deposit Insurance Corporation, Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

The FDIC issued an interim rule, effective April 1, 2006, to implement the deposit-insurance revisions in the Federal Deposit Insurance Reform Act of 2005 (Public Law No. 109-171)("Reform Act") and the Federal Deposit Insurance Reform Conforming Amendments Act of 2005 (Public Law No. 109-173). The comment period on the interim rule ended on May 22, 2006, 71 FR 14629 (Mar. 23, 2006) ("Interim Rule").

The Reform Act made three substantive changes to the insurance coverage provisions of the Federal Deposit Insurance Act (12 U.S.C. 1813-1835a). Those changes are discussed in detail in the preamble to the Interim Rule. Summarizing: first, section 2103(a) of the legislation provides for an inflation index to be applied to the current maximum deposit insurance amount of $100,000, defined in the Reform Act as the "standard maximum deposit insurance amount" ("SMDIA"). Beginning April 1, 2010, and every succeeding five years, subject to approval by the Board of Directors of the FDIC and the National Credit Union Administration Board, the current SMDIA could be increased by a cost-of-living adjustment.

Second, section 2103(c) of the Reform Act increases the deposit insurance limit for "certain retirement accounts" from $100,000 to $250,000, also subject to the inflation adjustment described above. The types of accounts that come within this provision are detailed below. And, third, section 2103(b) of the Reform Act provides per-participant coverage to employee benefit plan accounts, even if the depository institution at which the deposits are placed is not authorized to accept employee benefit plan deposits. The Reform Act eliminates the former requirement that an insured depository institution meet prescribed capital requirements before employee benefit plan deposits accepted by that institution would be eligible for per-participant coverage.

II. Comments on the Interim Rule

The FDIC received three written comments on the Interim Rule. Each of the comments was from a national banking industry trade association. The first trade association simply stated its support for the Interim Regulation. The second association stated its support for the Interim Rule and commended the FDIC for issuing the interim regulations and making them effective within two months of the passage of the Reform Act. The comment endorsed the FDIC's approach in amending its regulations to implement the deposit insurance revisions to the FDI Act.

The third banking industry trade group also expressed support for the Interim Rule and commended the FDIC for moving quickly to put the provisions into effect. In addition,

this trade group suggested that the FDIC clarify through the use of examples the types of deposit accounts that are and are not eligible for the increased insurance coverage. In particular, the trade group noted that bankers have questions concerning some types of defined contribution plan accounts and that the nomenclature used in the FDIC's retirement account regulations might not match the terminology used and understood by bankers and depositors. The association also suggested that the FDIC provide a more detailed explanation of the term "self-directed" in connection with the eligibility of certain Keogh plan accounts and defined contribution plan accounts for the increased coverage of $250,000.

The FDIC agrees with the trade group's comments and, therefore, has provided below a discussion more clearly specifying the types of retirement accounts that are, and are not, eligible for coverage up to $250,000. We also provide a more detailed explanation of the term "self-directed." The FDIC intends to include this clarifying information in its educational materials to bankers and the public on deposit insurance coverage.

III. The Final Rule

A. Overview

The final rule makes no substantive changes to the Interim Rule. The only revisions to the regulation text are the technical changes explained below. As noted, the following discussion is in response to the suggestion made by one of the commenters that the FDIC

be more specific about the types of retirement accounts eligible for the new $250,000 coverage limit.

B. Types of Retirement Accounts Eligible for the Increased Coverage Limit of $250,000

As specified in the FDI Act (12 U.S.C. 1821(l)), the types of accounts within this category of coverage continue to be comprised of: (1) individual retirement accounts described in section 408(a) of the Internal Revenue Code ("IRC") (26 U.S.C. 408(a)) ("IRAs"); (2) eligible deferred compensation plan accounts described in section 457 of the IRC (26 U.S.C. 457) ("Section 457 Plan Accounts"); and (3) individual account plans defined in section 3(34) of the Employee Retirement Income Security Act ("ERISA") (29 U.S.C. 1002) ("Defined Contribution Plan Accounts") and any plan described in section 401(d) of the IRC ("Keogh Plan Accounts"), to the extent that participants and beneficiaries under such plans have a right to direct the investment of assets held in individual accounts maintained on their behalf by the plans. Each of these types of retirement accounts is discussed below.

IRAs

Section 408(a) of the IRC defines an IRA as a "trust created or organized in the United States for the exclusive benefit of an individual or his or her beneficiaries, but only if the written governing instrument creating the trust meets [specified] requirements."[1] For

[1] During the pendency of the Interim Rule a Puerto Rico resident asked whether IRAs issued by FDIC-insured banks in Puerto Rico would be eligible for the $250,000 maximum insurance coverage provided

purposes of deposit insurance coverage, IRAs include: *traditional* IRAs (into which individuals may make tax-deductible contributions, within prescribed dollar limitations, on which the earnings are tax-deferred); *Roth IRAs*[2] (into which individuals may make contributions (within prescribed dollar limitations) the earnings on which are tax-free; *Simplified Employee Pension ("SEP") IRAs*[3] (into which employers may make contributions to traditional IRAs established by employees); and *Savings Incentive Match Plans for Employees ("SIMPLE") IRAs*[4] (into which employers of eligible small companies are required to make either matching contributions to the plan or non-elective contributions paid to eligible employees regardless of whether the employee makes salary-reduction contributions to the plan). Like the other retirement accounts, all IRA products must be held in the form of deposits at FDIC-insured depository institutions to be eligible for FDIC deposit insurance coverage. An individual's interests in all these types of IRAs are combined with his or her interests in any of the other retirement accounts (eligible for the $250,000 coverage limit) and insured to a limit of $250,000. For example, if an individual has $75,000 in a traditional IRA, $100,000 in a Roth IRA and a $100,000 interest in a self-directed Defined Contribution Plan Account, $250,000 of the combined amount of the accounts would be insured and $25,000 would be uninsured.

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under the Reform Act. The person expressed concern that such IRAs might not meet the definition of IRAs in the applicable provision of the FDI Act, 12 U.S.C. 1821(a)(3) ("Section 11(a)(3)"). Section 11(a)(3) encompasses IRAs "described in section 408(a) of [the Internal Revenue Code]" ("Section 408(a)"). In answer to the person's inquiry, the FDIC deems IRAs issued by banks in Puerto Rico to qualify as IRAs described in Section 408(a) because the IRA provisions of the Puerto Rico tax code are sufficiently similar to the provisions of Section 408(a). 13 L.P.R.A. 8569 (2005). This treatment of IRAs at FDIC-insured institutions in Puerto Rico is the same as the treatment of IRAs at credit unions in Puerto Rico insured by the National Credit Union Share Insurance Fund. 12 C.F.R. 745.9-2.

[2] 26 U.S.C. 408A.

[3] 26 U.S.C. 408(k).

[4] 26 U.S.C. 408(p)

The increased coverage of $250,000 for IRAs applies irrespective of whether an IRA is "self-directed," a subject more fully discussed below.

Section 457 Plan Accounts

Section 457 plans are defined in section 457 of the IRC to include eligible deferred compensation plans provided by state and local governments, as well as not-for-profit organizations. As provided under the applicable provisions of the FDI Act, deposit accounts held at FDIC-insured institutions in connection with Section 457 Plans are eligible for insurance coverage up to $250,000 per plan participant. This coverage applies irrespective of whether the Section 457 Plan is "self-directed."

Self-directed Defined Contribution Plan Accounts

A Defined Contribution Plan Account is defined in ERISA as a "pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains losses, and any forfeiture of accounts of other participants which may be allocated to such participant's account."[5] As provided for in the applicable provisions of the FDI Act (as revised by the Reform Act), Defined Contribution Plan Accounts held in the form of deposits at FDIC-insured institutions are eligible for coverage up to $250,000 per

participant's interest; however, the FDI Act specifies that this coverage is provided only if the participants under such plans have a right to direct the investment of assets held in individual accounts maintained on their behalf by the plans. This means that only "self-directed" Defined Contribution Plan Accounts come within the "certain retirement account" category of coverage. As indicated in the Interim Rule and discussed in more detail below, the FDIC continues to define the term "self-directed" to mean that the plan participants have the right to direct how their funds are invested, including the ability to direct that the funds be deposited at an FDIC-insured institution.

The most common type of Defined Contribution Plan Account is the popular section 401(k) plan, established under section 401(a) and 401(k) of the IRC (26 U.S.C. 401(a) and 401(k)). Self-directed Savings Incentive Match Plans for Employees held in the form of 401(k) plans (referred to as SIMPLE 401(k)s) qualify under this account category as well as self-directed defined contribution money purchase plans (in which employer contributions are fixed) and self-directed defined contribution profit-sharing plans (in which employer contributions are based on company profits).

Self-directed Keogh Plan Accounts

Section 401(d) of the IRC describes a "trust forming part of a pension or profit-sharing plan which provides contributions or benefits for employees some or all of whom are

[5] 29 U.S.C. 1002(34).

owner-employees." These so-called "Keogh" (or "H.R. 10") plan accounts are designed for self-employed individuals. As provided for in the applicable provisions of the FDI Act (as revised by the Reform Act), "self-directed" Keogh plan accounts held in the form of deposits at FDIC-insured institutions are eligible for coverage up to $250,000 per participant's interest.

C. The Meaning of "Self-Directed"

As indicated in the Interim Rule and reiterated above, the FDIC continues to define the term "self-directed" to mean that plan participants have the right to direct that their funds be deposited into a specific FDIC-insured institution. One question the FDIC received on the Interim Rule was whether an open-ended plan, in which the participants could choose any investment, would be considered "self-directed." A related question involved a feature of a plan where, if the employee does not make any other selection, he or she will be deemed to have chosen to invest funds in a deposit account. In response to the comment on an open-ended investment plan, as long as the participant has the right to choose a particular depository institution's deposit as an investment, the FDIC would consider the account to be "self-directed." Also, if a plan has as its "default" investment option deposits of a particular FDIC-insured institution, the FDIC would deem the plan to be self-directed for deposit insurance purposes because, by inaction, the participant has directed that the funds be placed at an FDIC-insured institution. As explained in an FDIC advisory opinion, if a plan's only investment vehicle is the deposits of a particular bank, so that participants have no choice of investments, the plan would not be deemed "self-

directed" for deposit insurance purposes. FDIC Adv. Op. 93-65 (Sept. 17, 1993). If, however, a plan consists only of a single employer/employee, because the employer establishes the plan with a single-investment option of plan assets, the plan would be considered "self-directed." Hence, single employer/employee defined contribution plans which limit the options of fund investments to deposits of a particular insured depository institution would be self-directed for deposit insurance purposes.

D. Accounts not qualifying for the increased coverage

In response to questions received during the comment period, it is important to emphasize that only the types of retirement accounts specified in the FDI Act are eligible for the increased retirement account insurance limit of $250,000. Thus, accounts such as *Coverdell* education savings accounts, Health Savings Accounts and Medical Savings Accounts are not eligible for the increased coverage limit. Also, accounts established under section 403(b) of the IRC (annuity contracts for certain employees of public schools, tax-exempt organizations and ministers) do not come within the retirement account category.

Notably, defined-benefit plans (in which benefits are predetermined by an employee's compensation, years of service and age) are not within the category of retirement accounts. For deposit insurance purposes, they are treated as employee benefit plans eligible for pass-through coverage up to $100,000 per participant's interest. 12 CFR

330.14(a). Defined contribution plan accounts and Keogh plan accounts that are not "self-directed" also would not be insured under the retirement account category. Instead, they would be insured as employee benefit plan accounts.

C. Technical Revisions

In the Interim Rule the FDIC inadvertently retained Section 457 accounts in the category of employee benefit plans under section 330.14(a) eligible for per-participant coverage of $100,000. As noted, Section 457 Plan Accounts are eligible for the increased coverage of $250,000. Also, in the Interim Rule the reference to $100,000 in section 330.6(d) should have been changed to "the SMDIA" and there was a citation error in section 330.14(b)(2). The Final Rule corrects these technical errors.

IV. Paperwork Reduction Act

The final rule will implement statutory changes to the FDIC's deposit insurance regulations. It will not involve any new collections of information pursuant to the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Consequently, no information collection has been submitted to the Office of Management and Budget for review.

V. Regulatory Flexibility Act

A regulatory flexibility analysis is required only when an agency must publish a notice of proposed rulemaking (5 U.S.C. 603, 604). Because the revisions to part 330 were

published in interim final form without a notice of proposed rulemaking, no regulatory flexibility analysis is required.

VI. The Treasury and General Government Appropriations Act, 1999--Assessment of Federal Regulations and Policies on Families

The FDIC has determined that the final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, enacted as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999 (Public Law 105-277, 112 Stat. 2681).

VII. Small Business Regulatory Enforcement Fairness Act

The Office of Management and Budget has determined that the final rule is not a "major rule" within the meaning of the relevant sections of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") (5 U.S.C. 801 et seq.). As required by SBREFA, the FDIC will file the appropriate reports with Congress and the General Accounting Office so that the final rule may be reviewed.

List of Subjects in 12 CFR Part 330

Bank deposit insurance, Banks, banking, Reporting and recordkeeping requirements, Savings and loan associations, Trusts and trustees.

For the reasons stated above, the Board of Directors of the Federal Deposit Insurance Corporation adopts as a final rule the interim final rule amending 12 CFR part 330, which was published at 71 FR 14629 on March 23, 2006, with the following changes:

Part 330 – DEPOSIT INSURANCE COVERAGE

1. The authority citation for part 330 continues to read as follows:

Authority: 12 U.S.C. 1813(l), 1813(m), 1817(i), 1818(q), 1819 (Tenth), 1820(f), 1821(a), 1822(c).

2. In section 330.6(d) remove "$100,000" and add in its place "the SMDIA".

3. In section 330.14, revise paragraph (a); redesignate (b)(2)(A), (b)(2)(B), (b)(2)(C) as (b)(2)(i), (b)(2)(ii) and (b)(2)(iii); and revise newly designated (b)(2)(ii) to read as follows:

§ 330.14 Retirement and other employee benefit plan accounts.

(a) "Pass-through" insurance. Any deposits of an employee benefit plan in an insured depository institution shall be insured on a "pass-through" basis, in the amount of up to

the SMDIA for the non-contingent interest of each plan participant, provided the rules in § 330.5 are satisfied. Deposits eligible for coverage under paragraph (b)(2) of this section that also are deposits of a employee benefit plan or deposits of a deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457) in an insured depository institution shall be insured on a "pass-through" basis in the amount of $250,000 for the non-contingent interest of each plan participant, provided the rules in § 330.5 are satisfied.

(b) ***

(2) ***

(ii) Any eligible deferred compensation plan described in section 457 of the Internal Revenue Code of 1986 (26 U.S.C. 457); and

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By order of the Board of Directors.

Dated at Washington D.C., this 5th day of September, 2006.

FEDERAL DEPOSIT INSURANCE CORPORATION

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Robert E. Feldman

Executive Secretary

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